UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMAU, INC.,

Respondent Employer,

-and-

Cases 7-CA-52614 and 7-CA-52939

AUTOMATED SYSTEMS WORKERS LOCAL 1123, affiliated with CARPENTERS INDUSTRIAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Charging Party,

-and-

COMAU EMPLOYEES ASSOCIATION (CEA),

Party in Interest.

COMAU EMPLOYEES ASSOCIATION (CEA),

Respondent Union,

-and-

Case 7-CB-16912

AUTOMATED SYSTEMS WORKERS LOCAL 1123, affiliated with CARPENTERS INDUSTRIAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Charging I	Party.
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RESPONDENT COMAU, INC.'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

KIENBAUM OPPERWALL HARDY & PELTON, P.L.C. Thomas G. Kienbaum Theodore R. Opperwall Attorneys for Respondent, Comau, Inc. 280 N. Old Woodward Avenue, Suite 400 Birmingham, MI 48009 (248) 645-0000

Dated: March 15, 2011

The General Counsel's combined answering brief to the two Respondents' exceptions treads predictable ground, and Respondent Comau limits its reply to a few central points.

A. The December 2009 Disaffection Petition Was Not Tainted.

The General Counsel culls from the testimony of several employees who testified at the November 2009 *Saint Gobain* hearing isolated references to the new health care plan as being a source of employee disaffection with the ASW-Millwrights (GC Brief, pp. 7-8). These few snippets of testimony cannot, however, overcome the fundamental problem with the General Counsel's causation theory, which the ALJ erroneously adopted. A petition seeking to decertify or withdraw recognition from an incumbent Union can be tainted if the employees' dissatisfaction with the Union is <u>caused</u> by an unfair labor practice. *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1458 (D.C. Cir. 1997). However, causes invariably precede effects. Here, it is absolutely undisputed that there was no unfair labor practice until March 1, 2009, and that employee disaffection with the ASW-Millwrights had reached a high pitch well before that date because of that Union's broken promises and excessive dues. Even if 34 employees signed the decertification petition after March 1, more than twice as many (69) signed before that date. (ALJ Decision, p. 19, lines 14-17.)

The General Counsel accuses Comau of ignoring "the fact that the ALJ was tasked not with determining whether the April 2009 <u>decertification</u> petition was tainted by Comau's unfair labor practices, but with whether the December 2009 <u>disaffection</u> petition was." (GC Brief, p. 9.) Comau is well aware of the issues before the ALJ in this case. However, the ALJ chose to

¹ The Board found in *Comau*, *Inc.*, 356 NLRB No. 21 (2010), that the so-called "implementation" of the health care plan on this date was an unfair labor practice. Comau has petitioned for review of this decision by the U.S. Court of Appeals for the D.C. Circuit.

make the employees' mindset at the time of the decertification petition an integral part of his logic for invalidating the December 2009 disaffection petition:

- "[Other sources of employee] discontent... had been present since the ASW-MRCC merger in March 2007, but were tolerated to some degree with the hope that in the end, the merger would be beneficial" (p. 20, lines 36-38);
- "[After March 1, 2009], bargaining unit discontent with the ASW-MRCC reached a new high, and carried forward to December 2009..." (p. 19, lines 17-18).

The General Counsel (GC Brief, pp. 10-11) attempts to support the ALJ's speculation that other powerful sources of discontent — e.g., "unduly high dues that came with little or no resulting benefit to the bargaining unit," broken "promises to provide bargaining unit members with training and job placements," and the Millwrights' swallowing of the \$250,000 balance in the ASW's dues account — had been "tolerated to some degree" and that the employees were prepared to keep on tolerating them. (Decision, p. 19, lines 38-44.) But the General Counsel offers only more speculation, positing that because (1) the ASW-Millwrights dues had been at high levels for two years, and (2) the funds transfer also occurred two years earlier, these could no longer be flash points triggering employee disaffection. (GC Brief, pp. 10-11.) Yet it is far more reasonable and supportable to conclude that these issues kept chafing more and more as the months and years passed without the employees receiving the promised jobs and training that were supposed to flow from affiliation with a larger union and justify its exorbitant dues.

If a substantial number of employees had already reached the point of wanting to decertify the Union before March 1, 2009, and had taken concrete steps to do so prior to that date, those employees surely remained disaffected for the same reasons throughout 2009. The ASW-Millwrights produced nothing positive after March 1 and did not even attempt to resume bargaining. The ALJ's finding that the employees who testified at the November 2009 *Saint*

Gobain hearing were "reminded of the fact" that the new health care plan was one of their concerns when they signed the decertification petition nine months earlier was a strained effort to relabel longstanding disaffection (for reasons other than the health care change) as something rediscovered after March 1, 2009.

B. The Remedy Ordered By The ALJ Is Excessive.

Defending the bargaining order recommended by the ALJ, the General Counsel argues (Brief, pp. 18-20) that the Board's decision on remand in *In re Vincent Industrial Plastics, Inc.*, 336 NLRB 697 (2001), supports the ALJ's weighing of relevant factors. But the facts in *Vincent* were very different. There the union was a newly certified collective bargaining representative, and the employer was clearly creating a series of impediments during negotiations for a first contract by making unilateral changes before impasse in its attendance policy, timekeeping procedures, and job duties. Eventually the employer disciplined a union negotiator and discharged the union president. Adhering on remand to its ruling that a bargaining order was appropriate, the Board commented:

Because the <u>only</u> demonstrated dissatisfaction with the Union appears to have been unlawfully fomented by the Respondent's own actions, a temporary decertification bar would trench very little on genuine employee desire (if there is any) to remove the Union as the bargaining representative. At the same time it would protect the countervailing desire to be represented by the Union initially expressed by a majority of the employees. . . . *Id.* at 697-699 (emphasis added).

Vincent thus supports Comau's position that no bargaining order should be issued. Here, there was abundant evidence that employee dissatisfaction with the ASW-Millwrights was fomented by the ASW-Millwrights' own actions and inactions. The bargaining order recommended by the ALJ would trample the desire of a majority of employees to remove the ASW-Millwrights — a desire already frustrated for two years by the Region's insistence on

siding with the ASW-Millwrights and making no attempts to ascertain through an election which union enjoyed majority support. This order disregards rather than weighs the employees' Section 7 rights.

Notably, the General Counsel has not responded to Comau's point that the ALJ overstepped all bounds by declaring that Comau may not recognize the CEA unless and until the CEA is certified by the Board as the employees' representative. Comau is aware of no precedent for going to such lengths to prevent recognition of a union that plainly enjoys significant employee support. Certainly, the CEA, which is the revival of the pre-merger independent union that represented the employees for decades, does not deserve to be singled out in this fashion.

Respondent Comau's exceptions to the ALJ's decision should be upheld.

Respectfully submitted,

KIENBAUM OPPERWALL HARDY

& PELTON, P.L.C.

Ву:

Thomas G. Kienbaum

Theodore R. Opperwall

Attorneys for Respondent, Comau, Inc. 280 N. Old Woodward Avenue, Suite 400

Birmingham, MI 48009

(248) 645-0000

Dated: March 15, 2011

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PROOF OF SERVICE

Pursuant to 28 U.S.C. §1746, I hereby certify under penalty of perjury that the following is true and correct: On March 15, 2011, I caused to be served via electronic mail a copy of RESPONDENT COMAU, INC.'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION upon:

Sarah Pring Karpinen
Darlene Haas Awada
Counsel for the General Counsel
National Labor Relations Board – Region 7
477 Michigan Avenue, Room 300
Detroit, MI 48226-2569
Darlene.haasawada@nlrb.gov
Sarah.karpinen@nlrb.gov

M. Catherine Farrell Pierce Duke Farrell & Tafelski 2525 S. Telegraph Road, Suite 200 Bloomfield Hills, MI 48302 Catherine@farrellesq.com Edward J. Pasternak 2000 Town Center, #2370 Southfield, MI 48075

David J. Franks 20020 Harper Ave., #10 Harper Woods, MI 48225 dfranks@franksconnect.com

naribul Geognie &